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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950.

No. 258

DEAN MILK COMPANY, a corporation,

Appellant,

vs.

CITY OF MADISON, WISCONSIN, a Municipal Corporation, **DR. C. K. KINCAID**, as Health Commissioner for the City of Madison, Wisconsin, **LEONARD HOWELL**, as City Manager of the City of Madison, Wisconsin, and **THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN**,

Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

Appellant's Brief.

GEORGE S. GEFFS,
Janesville, Wisconsin.

JACOB GEFFS,
ELI BLOCK,
Janesville, Wisconsin,
Counsel for Appellant.

Midwest Law Printing Co., 340 W. Huron St., Chicago

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Appellees.

Appeal from the Supreme Court of the State of Wisconsin

APPELLANT'S BRIEF.

Opinion of the Courts Below.

The opinion of the Supreme Court of the State of Wisconsin is reported in 257 Wis. 308 and 43 N.W. (2nd) 480; the opinion of the Circuit Court for Dane County is not officially reported, but is found in the record at pages 1-18.

Statement of Jurisdiction.

(a) The jurisdiction of this Court is invoked under the Act of June 25, 1948, C. 646, 62 Stat. 929 of the Judicial Code, 28 U.S.C.A. Sec. 1257 (2), from a final judgment of the Supreme Court of Wisconsin entered the 30th day of June, 1950. The above cited Judicial Code provides that a final judgment rendered in the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

There was drawn in question in this case the validity, under Section 8 of Article 1 and the 14th Amendment of the Constitution of the United States, of Sections 7.11 and 7.21 of the Madison, Wisconsin, city ordinances.

A city ordinance is a statute within the meaning of said Act of June 25, 1948, (28 U.S.C.A. Sec. 1257 (2)) for purpose of appeal to this court. *John P. King Mfg. Co.* v. *City Council of Augusta, et al.*, 277 U.S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

(b) Judgment of the Supreme Court of the State of Wisconsin was entered on June 30, 1950, and an appeal was allowed by that court to this Court on July 25, 1950.

Statement of the Case.

This case involves the validity, under Section 8 of Article 1 and the Fourteenth Amendment of the Constitution of the United States the following sections of the Madison Milk Ordinance, to-wit:

Section 7.11 of the Madison Milk Ordinance:

> "It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin."
>
> "Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit."
>
> "On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capitol Square. • • •"

Section 7.21:

> "It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream, or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capitol Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health."

Pleadings.

The Supreme Court of Wisconsin made the following summary of the pleadings:

> "This is an action by the Dean Milk Company, an Illinois corporation, against the City of Madison, Dr.

C. K. Kincaid, its health commissioner, Leonard Howell, its city manager, and its common council, for a declaratory judgment as to the constitutionality of two sections of the milk ordinance of said city providing substantially as follows: (1) No milk shall be sold as pasteurized milk in the City of Madison unless it has been pasteurized and bottled within a radius of five miles from the capitol square; and (2) the health department shall not be obligated to inspect and issue permits to farms supplying raw milk for sale in said city if said farms are located beyond twenty-five miles from the capitol square. Judgment was entered December 30, 1949, declaring: (1) That the five-mile limitation is constitutional, and (2) that in this action no justiciable controversy existed as to the twenty-five mile limitation and plaintiff's complaint was dismissed so far as it involved that question. Plaintiff appealed from the judgment.

"Plaintiff is engaged in distributing Grade A pasteurized milk and other milk products in Chicago and other communities in Illinois and southern Wisconsin, including some within Dane County. It purchases and gathers milk from approximately nine hundred fifty farms located in northern Illinois and southern Wisconsin. None of these farms is within twenty-five miles of Madison. It pasteurizes and bottles the milk so gathered in plants at Chemung and Huntley, Illinois. The exact distance from these plants to Madison does not appear in the record, but they are located beyond the Southern boundary of the state of Wisconsin which is approximately fifty miles from Madison. (The record shows Chemung Illinois is 65 miles and Huntley Illinois is 85 miles from Madison (R. 84.))

"On March 8, 1948, the plaintiff applied to the city of Madison for a license to sell its Grade A pasteurized milk and other milk products within the city. On March 12, 1948, its application for such license was denied. On November 20, 1948, plaintiff com-

menced this action for declaratory relief. While this suit was pending, and on August 27, 1949, the city of Madison adopted a new ordinance retaining the five-mile limitation and inserting the twenty-five mile limitation, which up to that time had not been a part of its milk ordinance. On October 1, 1949, plaintiff applied to the Madison Board of Health for nine hundred fifty farm application blanks. They were not forwarded. Plaintiff then filed an amended complaint attacking both the five-mile and twenty-five mile limitations. The defendants secured an order to show cause why all reference to the twenty-five mile limitation should not be stricken from the plaintiff's amended complaint. The trial court denied this order to show cause but ordered plaintiff to file a second amended complaint separating the two causes of action. Thereafter the plaintiff filed its second amended complaint."

This complaint contained the allegations of the original complaint, alleging that the plaintiff's milk complied with the requirements of the present Madison ordinance, except that it was not pasteurized within 5 miles of Madison; that it would be useless for the plantiff to make application under the new ordinance, because the defendants took the position that they were not obligated to inspect plaintiff's plant and issue it a license, because its pasteurization plant was not located within the 5 mile zone; that the plaintiff's milk and milk products were wholesome and Grade A as provided in United States Model Milk Ordinance promulgated by the United States Public Health Service; that it was inspected regularly by the inspectors of the Chicago Board of Health; that it fully complied with the Chicago Milk Ordinance; that the Chicago ordinance was equivalent to that of the Madison ordinance; that although the plaintiff made application on March 8th, 1948, the defendants had made

no attempt to inspect the said farms from which the plaintiff obtains milk, or to inspect its plant or the vehicles in which said milk is transported, and have made no attempt to satisfy themselves that said milk was produced, pasteurized and transported pursuant to the provisions of the city ordinance of the city of Chicago, which is equivalent to the Madison ordinance; that the defendants have taken no steps whatever to satisfy themselves as to the purity, quality, and sanitation of the plaintiff's milk, and do not propose to do so, and claim that they have the right to refuse to do so, and to bar the plaintiff from selling milk in the City of Madison, Wisconsin, solely because the plaintiff's milk is not pasteurized within the 5 mile zone; that Section 7.25 of the ordinance adopted August 27th, 1949, by the defendant city, provides:

> "This ordinance shall be enforced by the Health Commissioner in accordance with the interpretation thereof contained in the current edition of the United States Public Health Service Milk Code, a certified copy of which shall be on file in the city clerk's office, provided that in case of upward revisions, the provisions shall be interpreted according to the provisions expressed in this ordinance."

That Section 11 of the United States Public Health Service Milk Code above referred to reads as follows:

> "Milk and milk products from points beyond the limits of routine inspection of the city of ..... may not be sold in the city of ....., or its police jurisdiction unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance: provided that the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provision."

That the following comment is made by the United States Public Health Service following the proposed section:

> "It is suggested that the health officer approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a rating of 90 percent or more on the basis of the Public Health Service rating method."

That plaintiff's milk and milk products have been awarded a rating of better than 90 percent by the State Control Agency.

That the plaintiff sells its milk and milk products in the city of Chicago and over 200 other municipalities in the State of Illinois and the State of Wisconsin; that the health officer of the City of Madison without undue expense or inconvenience could long before this time have satisfied himself that plaintiff's milk is produced, pasteurized and distributed under health standards equal and equivalent to those prescribed by the present ordinance of the City of Madison, Wisconsin, and that said standards were being enforced by other municipalities, and by the plaintiff maintaining inspectors of said farms, pasteurization plant and delivery vehicles; and that the milk proposed to be sold by the plaintiff meets the requirements of the milk ordinance and standard code recommended by the United States Public Health Service, and prayed for a declaratory judgment, declaring the 5 mile limitation to be in violation of both the Fourteenth Amendment and the Interstate Commerce Clause of the United States Constitution. (R. 19-28.)

The defendants' answer was a general denial of most of the allegations and alleged that even though the plaintiff's milk was produced, pasteurized, and transported under ordinances equivalent to the Madison ordinance, that such facts were immaterial and further alleged:

> "Defendants admit they have taken no steps to satisfy themselves as to the purity, quality or sanitation of the plaintiff's milk and further admit that they do not propose to do so and that they claim they have the right not to do so and further have the right to refuse to grant any license to the plaintiff because the plaintiff's milk is not pasteurized within the five mile zone as provided in the Madison City Ordinances, and *also for other reasons.*"

Defendants further alleged:

> "Defendants deny that the health officer of the City of Madison could by any means other than continual inspection of the plaintiff's plants and of the several hundred farms which deliver to those plants satisfy himself that the plaintiff's milk is being produced, pasteurized and distributed in the manner required by the Ordinances of the City of Madison, and defendants allege that such continual inspection would create undue expense and inconvenience to the City of Madison. Defendants deny that inspection by the plaintiff or by other municipalities has any materiality in this controversy and further deny that they have any information or knowledge sufficient to form a belief as to whether the plaintiff's milk meets the requirements of the said Ordinances and Code prepared by the United States Public Health Service and defendants deny upon information and belief that the provisions of that ordinance and code are equivalent to the provisions of the Madison Ordinances" (R. 43-44).

The plaintiff in its second count incorporated most of the allegations in the first cause of action and alleged

that the defendants in their original answer had raised the objection that the inspection of the farms from which plaintiff obtained its milk would cause an undue burden to Madison because of the number and distance of the farms from Madison; that Madison adopted a new ordinance on August 27th, 1949, which provided in Sec. 7.11 that the health department would not be obligated to inspect and issue permits to farms located more than 25 miles from Madison; that the Madison health department took the position that it had an absolute right to refuse to inspect farms more than 25 miles distance and not to issue permits to said farms; that plaintiff's business was dependent upon obtaining milk from farms located more than 25 miles from Madison; that the said ordinance as interpreted by the defendants was a violation of the Fourteenth Amendment and the Interstate Commerce Clause of the United States Constitution; that the Health Commissioner of Madison could with little expense and little inconvenience satisfy himself that the farms from which the plaintiff obtained its milk were sanitary and operated in accordance with the provisions of the Madison ordinance, and prayed judgment that Sec. 7.11 of the Madison ordinance be declared unconstitutional (R. 28-33).

The defendants in their answer to the second cause of action in Count II admitted that the defendants' original answer contained the allegations of inconvenience and expense of inspecting the farms from which plaintiff obtained its milk, and alleged that any application by said farm owners supplying milk to Dean Milk Company to deliver milk in Madison, which milk had been pasteurized outside of the 5 mile pasteurization limit would be denied, and that:

"28. The defendants admit that they take the position that the Madison Health Department has a discretion as to the inspection of farms located more than 25 miles from Madison and the issuance of permits to such farms and that it has the right to deny the issuance of permits to such farms and to deny plaintiff the right to sell its milk products made from milk produced on such farms, in the City of Madison and also for other reasons. The defendants deny that said Ordinance or any part of it is in violation of the Constitution of the United States or any amendment thereto or of any provision of the Constitution of the State of Wisconsin."

"30. Defendants allege that in view of the great supply of milk available within a radius of 25 miles from the Capitol Square of the City of Madison, the provision of the Madison Ordinance that the City need not inspect or issue permits to farms located beyond that radius is entirely reasonable and a proper health regulation and that said provision aids the effectiveness of inspection by the City Health Department and minimizes the cost thereof to the City and its tax payers" (R. 50).

and denied that a controversy existed as to the validity of Sec. 7.11 (the 25 mile limitation) so long as Sec. 7.21, the 5 mile limitation, stood (R. 47-51).

Trial Court's Findings.

The trial court made the following findings of fact:

"4. That the plaintiff, Dean Milk Company, is engaged in the purchase of milk from farm producers and in the pasteurization thereof, and in the sale of said pasteurized milk to retail stores in cities and villages in the states of Illinois and Wisconsin; that on the 8th day of March, 1948, the plaintiff herein made application to the City of Madison for a license to distribute pasteurized Grade 'A' Milk, cream and

milk products in the City of Madison and that on or about the 12th day of March, 1948, the plaintiff, Dean Milk Company, was notified by the Health Commissioner of the City of Madison that its application for a license was denied.

5. That the application of plaintiff for said license was denied because plaintiff's pasteurization plant was located at Chemung, Illinois, more than five miles from the central portion of the City of Madison, otherwise known as the Capitol Square and at a distance of about seventy-five miles from Madison" (R. 53).

The United States Model Milk Ordinance and Code.

Dr. C. K. Kincaid, the City Health Commissioner for the City of Madison, Wisconsin, testified that in 1922 the U. S. Public Health Service, realizing that there was considerable discrepancy from community to community and state to state, felt that they should recommend some sort of a standard by which farms and plants would be required to set up reasonably similar requirements since milk was milk and that such an ordinance was framed and has been recommended to the communities ever since 1922; that it has been revised occasionally since that time (R. 59-60). That over the course of years between 1500 and 2000 cities have adopted the United States Model Milk Ordinance and Code (R. 62).

The 1939 edition of the United States Model Milk Ordinance and Code was introduced into evidence as Exhibit 1 (R. 59), and we have set out the important parts at Record 161-193. In it we find the following "Foreword":

"The following milk ordinance and code, approved by the Public Health Service, Federal Security Agency, and the Bureau of Dairy Industry; U. S.

Department of Agriculture, is recommended for adoption by states and communities in order to encourage a greater uniformity of milk-control practice in the United States.

This ordinance and code embodies the best information at present available on milk-control legislation, but it should be considered subject to change as improvements are developed.

In order that it may have at its command the technical advice of a comprehensive group of experts in the various phases of the public health control of milk and milk products, and in allied problems relating to production, processing, and distribution, the United States Public Health Service has appointed a board of consultants, termed the Public Health Service Sanitation Advisory Board, composed of the following members:"

Here follows a long list of state health officers, sanitary engineers and experts from all over the country.

"The milk code should be used as the legal interpretation of the ordinance.

"A list of communities in which the milk ordinance recommended by the Public Health Service is in effect is issued from time to time by the Public Health Service. Inclusion in this list means that the State health department has reported that the milk ordinance in effect in that community is the Public Health Service milk ordinance without downward revisions, or changes in grade names, or significant changes in the form of the ordinance. Upward modifications do not bar from inclusion, but should be contemplated with extreme caution in order not to render the ordinance unenforceable. In the interest of national uniformity it is recommended that no changes be made in this ordinance when adopted locally unless upward revision is necessary to avoid

conflict with State laws. State health departments are requested to use the above rules in making reports to the Public Health Service."

The Model Milk Ordinance has been revised as of April, 1949, which was introduced in evidence (R. 59) as Exhibit 2. We have set out some of the important changes between the latest revision and the 1939 edition (R. 193-195).

In short, the Model Milk Ordinance and the revised edition set forth complete technical regulations for the sanitation of the farms, cows, health and cleanliness of the persons handling the milk, cooling, transportation, pasteurization, bottling, and temperature and sanitation in the distribution of milk and milk products. It defines Grade A pasteurized milk and milk products which is recognized as the highest standard all over the country. (Except certified milk used in infant care and sickness.)

The U. S. Model Milk Ordinance and the revised edition in Section 11, state the duty of the local health officer in regard to milk coming into his city from points beyond his routine inspection. This provision is recommended to safeguard the local community as to interstate milk and to make it possible for pure, wholesome sanitary milk to flow freely in interstate commerce. Section 11 of the 1939 edition and the suggestion of the United States Public Health Service (Exhibit 1) is as follows:

> Sec. 11. *Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the city of.....may not be sold in the city of....., or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance; *Provided*, That the health officer shall satisfy

himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions.

This section is intended to permit the health officer to bar milk and milk products shipped in from great distances unless he can assure himself that they meet the provisions of the ordinance. Under no conditions should the health officer authorize the receipt of such shipments if arrangements cannot be made for supervision, unless an emergency exists, in which case permission should be given for its receipt, provided it is labeled "ungraded milk" when distributed.

It is suggested that the health officer approve milk or milk products from distance points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a rating of 90 percent or more on the basis of the Public Health Service rating method (R. 191).

The revised edition makes the following provision:

Section 11. *Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the municipality of.....may not be sold in the municipality of....., or its police jurisdiction, unless produced and/or pasteurized under provisions which are substantially equivalent to the requirements of this ordinance and which are enforced with equal effectiveness as determined by a milk sanitation rating (R. 195).

It will be noticed that these sections refer to a rating of 90% or better. The United States Public Health Service in conjunction with the State health departments carry on at frequent intervals surveys of the efficiency of local health inspectors within their milk shed. In other

words, the United States Public Health Service evaluates the compliance of milk sheds with the provisions of the United States Model Milk Ordinance. The results of these surveys are furnished free of charge. To make it concrete, the United States Public Health Service in conjunction with the Illinois State Board of Health made an investigation of the Chicago milk shed which took the Chicago Milk Ordinance and determined first, whether it was the equivalent of the United States Model Milk Ordinance and second, if it was being enforced efficiently and then made a percentage rating of the sanitation on the farms and pasteurization plant. This information was, and is available to the Madison Health Department free of charge. In the case at bar, Exhibit 3, (R. 195-196) shows: (received in evidence R. 84)

> "The Bean Milk Company operating under permit from the Chicago Board of Health, *which has adopted the recommended milk ordinance and code of the Public Health Service,* is included in the last survey rating of the Chicago milk shed made cooperatively by the Public Health Service and the Illinois State Department of Public Health.
>
> "This survey gave a rating of raw milk sold to plants of 91.05% and a rating of pasteurization plants of 93.42%."

The United States Model Milk Ordinance and Code does not contain any mileage limitation upon the location of pasteurization plants or farms. Under the program of the United States Public Health Service each milk shed has its own inspectors. The United States Public Health Service inspects and evaluates the local milk ordinance and the local inspection service. If the local ordinance and local inspection service rates 90 per cent or better (R. 151-2) then section 11 of both the 1939 Edition of the

United States Model Milk Ordinance (R. 191) and the revised edition (R. 195) provide that a foreign or distant city may safely receive such milk without duplicating the inspection of the milk shed with its own inspection. This information is furnished without costs to the receiving city (R. 62-65, R. 150-153).

Wisconsin has adopted the United States Model Milk Ordinance and approved the rating service of the United States Public Health Service for interstate milk.

This case was tried in the Circuit Court for Dane County on October 10 and 11, 1949, and the opinion of that court was handed down December 13, 1949. Prior thereto on November 15, 1950, the Wisconsin State Department of Agriculture enacted General Order 125, entitled:

> *"Standards and regulations for the production and processing of milk and milk products for interstate shipment."*

Section 328.021 Wisconsin Statutes states that the courts, including the Supreme Court, shall take judicial notice of this regulation.

In the preface of this regulation is found the following:

* * * *

> "Now, for the first time, Wisconsin is making available a service which will provide inspection and continuous supervision for areas producing milk for the fluid markets in other states.
>
> "The people of other states and in the cities outside of Wisconsin seek a supply of high quality fluid milk in our state. They should not be expected or required to maintain their own inspection services in Wisconsin. Such states and cities, naturally, are

vitally interested in quality. *They want a milk supply that is pure and wholesome and which has been produced and processed under the highest quality standards from the standpoint of human health.* This is a just demand, and Wisconsin is in complete accord with such safeguards for the protection of public health.

"General Order No. 125 provides the machinery which will make it possible for our dairy plants to supply the demands of these out-of-state markets and give the people of those areas the *public health safeguards to which they are entitled. High sanitary standards are set up,* coupled with a close, continuous state inspection service by the Wisconsin State Department of Agriculture. This inspection will be supplemented by U. S. Public Health Service inspections to insure consumers throughout the United States that when they buy Wisconsin Grade A milk *they are getting milk which meets every human health and sanitation requirement.*

"The service provided by this order is primarily a service to milk consumers in the metropolitan centers throughout the United States. Service to Wisconsin producers and processers is secondary.

"The standards promulgated in the order have been modeled after the United States Public Health Service recommended ordinance and milk code, and its provisions are substantially the quivalent of this code.

"General Order 125 was *prepared jointly by* the Wisconsin State Department of Agriculture and the *State Board of Health.* The order has also been *approved* by the *State Board of Health.*"

* * *

"The plan calls for constant inspection and supervision of producing farms, plants, equipment and transportation facilities by competent milk sanitar-

ians employed by the Wisconsin Department of Agriculture. The State Board of Health will serve as the survey and certification agency and all ratings will be periodically spot-checked before publication by the Region V Office of the U. S. Public Health Service. In addition, the State Board of Health will serve in an advisory capacity to the program and will share in the responsibility for training of the milk sanitarians, plant managers and fieldmen."

City of Madison's expert witnesses testified that the Model Milk Ordinance provided for adequate inspection and the reciprocal provisions of Section 11 could safely be relied upon by the receiving city.

Dr. C. K. Kincaid, one of the defendants and City Health Commissioner of the City of Madison, testified (omitting the numerous objections, which were overruled).

Over the course of years there has been between 1500 and 2000 cities that have adopted the U. S. Model Milk Ordinance.

"Q. Doctor, in regard to Grade A pasteurized milk, in your opinion do you believe that the revised milk ordinance recommended by the United States Public Health Service, Exhibit 2, provides for reasonably adequate and safe regulation for the receiving city that receives milk? A. If this is enforced with effectiveness, yes. (R. 62.)

Q. Now, Doctor, I want to ask you about the enforcement of it. It is a fact that the United States Public Health Service, in conjunction with the state boards of health, conduct spot surveys and make tests to determine the efficiency of enforcement in the various areas of the country. That is enforcement in the producing area. Is that correct?

A. They do on request of a receiving city and they do routinely, sometimes, too.

Q. Your answer is yes, they do conduct tests in the producing area? A. Yes.

Q. And they will give the receiving city, free of charge, all of the information that they have on any producing area in question, is that correct?

A. Through the particular state board of health.

Q. Then you could request the State Board of Health here in Wisconsin to get the information for you, and they could get the information for you, is that correct?

A. Yes, sir.

Q. And get it for you free of charge?

A. Yes, sir.

Q. Where did my Exhibit 1 go to?

(Paper handed to counsel.) Now, Doctor, I call your attention to Section 11 of the model milk ordinance and will you read the ordinance, part of Section 11? A. (Reading.) 'Milk and milk products from points beyond the limits of routine inspection of the city of Blank may not be sold in the city of Blank or its police jurisdiction, unless produced and/or' (to the Reporter). I will give you this—'unless produced and/or (R. 63) pasteurized under the provisions equivalent to the requirements of this ordinance; provided that the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions.'

Q. Now, Doctor, will you read the suggestion that is made under Section 11 by the United States Public Health Service?

A. (Reading). 'It is suggested that the health officer approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a

rating of 90 per cent or more on the basis of the Public Health Service rating method. Subsection 29.'

Q. Now, Doctor, will you read Section 11 of Exhibit 2, 'Revised milk ordinance recommended by the U. S. Public Health Service'?

A. (Reading.) 'Milk and Milk Products From Points Beyond The Limits Of Routine Inspection. Milk and milk products from points beyond the limits of routine inspection of the municipality of Blank may not be sold in the municipality of Blank, or its police jurisdiction, unless produced and/or pasteurized under provisions which are substantially equivalent to the requirements of this ordinance and which are enforced with equal effectiveness as determined by a milk sanitation rating.'

Q. Now, the rating that they refer to is the 90 per cent, is that correct? A. Yes, sir. (R. 64).

Q. Now, Doctor, I will ask you as an expert in this field; In your opinion do you think that a city could safely follow the provisions of Section 11 of the milk ordinance and code, the original one, and the revised one?

• • •

A. Are you asking do I trust the United States Public Health Service?

Mr. Geffs: Q. That is it.

• • •

A. Yes, I think I can trust the United States Public Health Service.

Mr. Geffs: Q. And, in your judgment, a city could, with reasonable safety, follow the suggestions of this Section 11, is that correct?

• • •

A. I am not sure I understand the question. Would you repeat it?

(Last question read.)

Mr. Geffs: Q. And, in your judgment, a city could, with reasonable safety, rely and depend upon this Section 11? A. For the protection of the public health? (R. 65.)

Q. For the protection of the public health.

A. It is a matter of opinion. I think so.

Q. That answers the question. Now, Doctor, when this ordinance was passed by Madison on August 27, 1949, prior to the passage of it you had some discussion, did you, with the council members and officials of Madison in regard to it? A. Yes, sir.

Q. Well, I call your attention to Section 7.21 which provides that pasteurization plants are to be within a 5 mile radius of the capitol square, and I will ask you if you recommended that as a measure?

• • •

A. There had to be some paragraph concerning the inspection of plants located beyond the usual limits of inspection and two paragraphs were submitted to the council for their decision since I felt that I wasn't competent to decide that by myself. This present paragraph 7.21 was one of those that was submitted.

Mr. Geffs: Q. Then, I take it you did not recommend it. You say you did not feel competent to decide the question. You did not recommend this—

A. I recommended that the council choose one of the two paragraphs.

Q. What was the other one? A. The other one was similar to the Section 11 of the standard ordinance.

Q. But you did not make a definite (R. 66) recommendation that they accept this Section 7.21, the 5 mile limitation on the pasteurization plants?

Mr. Hanson: He just said he did.

Mr. Geffs: No, he said he submitted two.

Mr. Hanson: In the alternative.

Mr. Geffs: Let's let the doctor answer.

A. *I did not specify which I preferred because I felt that milk to the consumers in Madison would be safeguarded adequately were either of those two selected.*" (R. 67.)

And *Edward R. Friday,* the Senior sanitarian of the City Health Department of Madison, also testified:

"Q. You say 'trustworthy organizations'. In your opinion, the U. S. Public Health Service is a trustworthy organization?

A. To the best of my experience, it is" (R. 128).

Clarence Luchterhand called by the defendants is the Milk Sanitarian for the Wisconsin State Board of Health. He testified that the Wisconsin Department of Public Health recommends the United States Model Milk Ordinance and Code to the cities of Wisconsin for adoption and the Wisconsin Department of Public Health recommends Section 11 of the U. S. Model Milk Ordinance and Code; and that a municipality in receiving milk from distant points may safely rely upon a rating of 90% or more made by the United States Public Health Service; (R. 150-151), that the department had received ratings from the Chicago Milk shed and it showed for raw milk sold to plants 91.05%, pasteurization plants 93.42% and an average of 92.24% and that those ratings were satisfactory (R. 151-152).

Mr. Luchterhand read into the record the following from Exhibit 42, a booklet entitled, "Methods of Making Sanitation Ratings of Milk Sheds": (received in evidence R. 150)

Q. Referring to page 13? A. Page 13, Significance of Ratings.

Q. Would you read that, please? A. "These ratings are compliance ratings and not safety ratings. A high rating does not necessarily mean that all of the milk supplies sold in the community in question are safe, nor does low rating necessarily mean that all of the milk supplies sold in a community are unsafe. Neither the present rating method nor any other rating method thus far devised is an absolute measure of safety. Nevertheless, a pasteurized milk rating of 90 per cent determined as previously described does mean that the pasteurized milk supplies in general of the community in question are as safe as a reasonably strict enforcement of the milk ordinance recommended by the Public Health Service will make them. Citizens who limit their purchase of milk to Grade A pasteurized milk secured from communities with 90 per cent ratings may, for all practical purposes, ignore the danger of milk-borne infection. *The safest communities from the standpoint of milk borne disease are those in which all milk is pasteurized and in which the pasteurized milk rating is* 90 *per cent or more*" (R. 147-148).

Mr. Luchterhand further testified that the health officer of a municipality receiving milk is justified in relying upon a rating report of the Public Health Service or the health officer can make his own check (R. 150).

Mr. Lutcherhand also testified that as a State Sanitarian of the Wisconsin Board of Health, he is now working in cooperation with the U. S. Public Health Service and he is doing that because the State Department of Agriculture of Wisconsin is trying to qualify milk to comply with the Model Milk Ordinance so that when it is approved as Grade A pasteurized milk by the Wisconsin State Board of Health it will be received outside of the State of Wisconsin; and he further testified that

there was now a big program in the Department of Agriculture here in Wisconsin to qualify the milk to meet the requirements of Grade A pasteurized milk under the Model Milk Ordinance (R. 155-156). That program resulted in General Order 125.

He further testified that Exhibit 2, the revised Model Milk Ordinance and Code, was now in full force and effect (R. 158).

Evidence Given By Other Experts in the Field.

Dr. W. J. Corbett, Director of Laboratory Personnel for the Dean Milk Company, holding a doctor's degree from the University of Wisconsin in dairy technology, testified that he had examined the Madison Milk Ordinance of August 27, 1949, section by section, and that Dean's Grade A pasteurized milk and milk products were produced, pasteurized and distributed under city ordinances equivalent to the Madison Milk Ordinance; that the products complied with the Madison Milk Ordinance with a few minor differences that were of no importance i.e. the cooling of the milk is slightly different but that was taken care of by the clump count (R. 82); he further said that in his opinion the 5-mile limitation and the 25-mile limitation in the Madison Ordinance were not necessary health measures.

H. J. Burger, Milk Inspector of Janesville, Wisconsin, testified that Janesville was operating under the United States Model Milk Ordinance; that in his opinion Section 11 of the U. S. Model Milk Ordinance providing for reciprocal inspection is a sound health measure, and that in his opinion the 5-mile limitation is not a necessary health measure (R. 89).

He testified that under the old ordinance of Janesville, outside milk was not allowed and that "under the old ordinance we were unable to obtain Grade A pasteurized milk in Janesville. We did obtain Grade A milk under the new ordinance. The reason for that was Dean milk coming into Janesville marked Grade A practically compelled our dealers to do likewise, and become Grade A for competitive purposes" (R. 90).

He further testified that the Janesville Ordinance made no restriction as to the location of farms (R. 91).

Dr. Fred B. Welch, the Health Commissioner of Janesville, Wisconsin, testified that in his opinion the 5-mile limitation and the 25-mile limitation were not health measures (R. 93).

James H. Davis, Inspector of Farm Relations for the Dean Milk Company, with a B.S. degree from the University of Illinois, majoring in dairy production, testified that in his opinion the farms and equipment from which Dean obtained its milk complied with health standards of the Madison Ordinance (R. 98).

Robert Alder testified that he was the distributor for the Dean Milk Company in Southern Wisconsin; that he owns a milk plant of his own at Elkhorn, Wisconsin, and that it was licensed by the Wisconsin Department of Agriculture and that he had a Bachelor's Degree in dairying from the Federal Technical Institute of Switzerland; that Dean's Grade A milk and milk products were sold in 18 cities and villages in Dane County and that he would not be distributing Dean's products unless he believed that they were pure, wholesome and sanitary; that he obtained Dean milk products in the State of Illinois, brought them across the state line and sold them to stores in Wisconsin (R. 103, 104).

Park Livingston testified that he was an attorney-at-law and Vice-President of Dean Milk Company; that the Chicago inspectors take great pride in telling you that the Chicago City Ordinance is a Model United States Public Ordinance and Code. (R. 113).

Facts As to the Inspection of Dean's Milk.

The Dean pasteurization plants at Chemung, Illinois, and Huntley, Illinois, operate under permits of the Chicago Board of Health and under permits from the Illinois State Board of Health and the Illinois State Department of Agriculture; all of the farms from which Dean obtains milk operate under permits from the Chicago Board of Health.

These plants and farms are regularly inspected by the Chicago inspectors and the Chicago inspection is rated better than 90% by the United States Public Health Service as above pointed out, which means that in order for Dean to label its milk and milk products Grade A, that the provisions of the United States Model Milk Ordinance and Code are complied with 90% or better.

Dr. W. J. Corbett, Director of Laboratory personnel of Dean Milk Company testified that as each can of milk comes into the Dean plant from the Dean farms, it is opened and examined for odor; it is then dumped and regularly a sample is taken about twice a month for sediment tests; weekly for bacterial counts and the bacteria tests are the methylene blue test, and direct microscopic count, at least monthly (R. 80); and the laboratory pasteurized count on each sample of each producer's milk is run monthly.

He said that the sediment test is a test where a pint of milk is taken from the bottom of a can, forced through a small cotton pad for the purpose of determining whether the milk is free from dirt or filth. The bacterial counts are run to determine the compliance of the farms as to method of production, detection of diseased cows; unclean equipment and poor cooling; he testified that these tests are slightly more stringent than those required by the present Madison Ordinance (R. 80-81) He also testified that cities other than Chicago inspect Dean's plants and run spot checks on the farms; that the City of Kenosha, Wisconsin, recently checked about 500 farms and then issued a permit to the Dean Milk Company on August 11, 1949; that the Wisconsin Department of Agriculture recently made tests as to the purity and sanitation of Dean's milk from samples picked up at stores and delivery trucks; that these tests and tests made by Racine, Wisconsin, and other cities, show that the bacterial count is way under the number allowed by the present Madison Ordinance and that the butter fat count exceeds the requirement of the present Madison Ordinance (R. 82-83).

H. J. Burger, the local sanitary inspector of Janesville, Wisconsin, testified as follows:

> "I have made spot checks of the farms supplying milk to the Dean Milk Company; I have visited the Dean Milk plant twice and made two spot checks of farms at different times since they started supplying milk to Janesville" (R. 91).

He concluded that from his inspection he believed that the Dean Company was meeting the requirements of the Janesville Ordinance and he believed that he had done an adequate job of inspecting under the circumstances; that he had an opinion about the Chicago inspection and his opinion was that it was adequate (R. 92).

Dr. Fred B. Welch, Health Commissioner of Janesville, testified that he was familiar with the Chicago Milk Ordinance and that Janesville adopted the United States Public Health Milk Ordinance two years ago (R. 94); that there were minor details and insignificant variations between the Chicago Ordinance and the United States Public Health Ordinance which did not amount to very much and that you could accept either one of them and produce a good grade of milk (R. 95).

He further testified that he had heard Mr. Burger's testimony of the spot checks of the farms producing for the Dean Milk Company and in his opinion as Health Commissioner, those spot checks were sufficient (R. 96). He said that he had an opinion as to the efficiency of the inspection of the Chicago Board of Health based not only on the present, but over many years of close cooperation with them and that he could not speak highly enough for the Chicago Health Department (R. 97).

James H. Davis, the Director of Farm Relations for the Dean Milk Company, testified that he had charge of inspecting farms; that the Dean Milk Company has 7 inspectors under his supervision inspecting farms all the time and that each farm was inspected about once a month (R. 97);

that these inspections were in addition to the inspection of the cities and municipalities in which the Dean Milk Company sold milk;

that each farm has a permit from the Chicago Board of Health and that a copy is furnished to the Dean Milk Company which is available to any health officer who desires to inspect it (R. 98);

that the laboratory records showing the laboratory test for each farm is kept on file at the Dean Milk Company

and is available for inspection by any health officer (R. 99). He concluded by saying,

that he had examined the Madison Ordinance and the farms that produce milk for Dean substantially comply with the standards set forth in that ordinance (R. 101).

Additional Expert Testimony Given By Defendants-Appellees.

Dr. Louis Fauerback, testified that he was Assistant Health Commissioner of Madison, not in charge of milk inspection except in the absence of Dr. Kincaid; that his field was examination and immunization in the schools and assisting the Health Commissioner (R. 136);

that in his opinion the United States Model Milk Ordinance (Exhibit 1) was unreasonable because it is not a model in the sense that one calls for something perfect (R. 136-7).

He said he had discovered some differences between the present Madison Ordinance and the Chicago Ordinance; that the Madison Ordinance provided for selection of samples for testing, keeping records for inspection for the previous six months; and at any time an officer of the Health Department finds insufficient or inefficient equipment in the process of manufacturing, he shall be deemed guilty of violation of the ordinance; and he found no similar provision or was unable to find a similar provision in the Chicago Ordinance (R. 130).

He said that the Madison Ordinance took the average bacterial count from the last 3 samples and the Chicago from the last 4 samples (R. 130-131); that Madison requires inspection of dairy plant receiving stations monthly and Chicago every 6 months (R. 131); and further that

the Madison Ordinance allowed suspension on first violation if of serious enough nature and Chicago permitted suspension on the second violation (R. 131-132);

and in case of a shortage, Chicago could take all of the milk under its ordinance (R. 132). He also testified that

Madison provides 3 square feet of window space per stanchion and in new construction will require 4, Chicago requires 3 square feet of light per cow (R. 133-4); that Madison requires the manure to be pitched 50 feet from the barn and Chicago allows a 30 foot pitch (R. 133); that Madison requires a trap drain, Chicago doesn't have such a provision; that Madison requires 100 square inches of ventilation in the milk house, Chicago requires "well ventilated"; that Madison requires the facilities to heat the milk house, Chicago has no such requirement; that Madison requires milk to be cooled at 60°, Chicago requires cooling within one hour to 65° (R. 134).

Although Dr. Fauerback was of the opinion that milk which complied with the Chicago Ordinance would not meet the Madison Ordinance (R. 135), the trial judge was of the view that the differences pointed out by Dr. Fauerback were of no material significance in public health because the Court in its opinion said:

> "* * * counsel even argue the issue whether the 'methylene blue' or the 'plate count' is the preferable test to determine if the number of bacteria in milk exceeds 200,000 per c.c. * * *
>
> We shall not exhaust brain tissues on such wanderings (R. 5).
>
> * * * but 'blue test' or 'plate count'—a pitch of 50 or 30 feet from the barn—50° or 60° cooling— and such minute *ad infinitum*—go only to the question of

whether Madison or Chicago has the better kind of milk regulations as to health and sanitary requirements. These details as to how to produce and care for milk do not hit the constitutional issue of the 5-mile limit at all as we view it" (R. 6).

On cross examination, Dr. Fauerback's attention was called to Exhibit 2, the revised U. S. Milk Ordinance and Code, and he was asked if in his opinion whether a city in Southern Wisconsin could rely upon that in order to be reasonably safe in securing pure, wholesome, sanitary milk, and he answered that he did not think so (R. 137) but said *he was of the opinion from his study of the Chicago Milk Ordinance, that Grade A pasteurized milk produced and pasteurized under that ordinance is safe for human consumption if the inspections of the farms and the dairy plants are efficiently and adequately made and the laboratory tests are within the limitations of that ordinance* (R. 138-9). *He was of the opinion that southern cities buying milk in Wisconsin and relying upon the inspection up here were doing their duty in respect to the health of their citizens legally* (R. 138).

He said that he was acting health commissioner a number of times and under his administration, Grade A milk labeled as such was never sold in Madison; that he did not know whether Madison's old ordinance provided for Grade A milk or not; that up to the present time that he was testifiying, no milk sold in Madison under the new Madison ordinance was labeled Grade A milk and that he was of the opinion that milk sold in Madison today is safe for human consumption notwithstanding the fact that all of the provisions of the new ordinance are not being complied with (R. 142).

With reference to *Dr. Fauerback's* testimony in regard to cooling the milk immediately after milking to 60 de-

grees, the defendants' witness, Edward R. Friday, senior Sanitarian of Madison, testified that the Madison Ordinance required a plate count of 200,000 which means that the count of bacteria shall not exceed 200,000 when milk is delivered to the dairy; that the Chicago Ordinance had the same requirement and that if Chicago accomplished the same thing by slightly different methods, then the Madison Ordinance has been met (R. 124-5).

Dr. W. J. Corbett, testified for plaintiff-appellant on the same subject. He said that the purpose of the Madison Ordinance requiring milk to be cooled to 60 degrees was to keep the bacteria count down when it was delivered to the dairy; that both the Madison Ordinance and the Chicago Ordinance provided that the count should not exceed 200,000 per c.c.; which is popularly called the "clump count"; and that the Chicago Ordinance (for all scientific purposes) complies with the requirement of the Madison Ordinance (R. 79).

Harvey Thew, a witness for the defendants-appellees, testified that Grade A milk labeled as such is not sold in Madison today; that the present Madison Ordinance requires that milk be labeled; that his belief was that the health department has not had sufficient time to approve of all conditions of the Madison market for Grade A; that he had been in the milk business around Madison since 1926 and Grade A milk labeled as such has never been sold in Madison except for a few years, a number of years back, when the State of Wisconsin had a Grade A milk law (R. 121).

Dr. C. K. Kincaid, the Health Commissioner of Madison, testified that the Madison Ordinance of August 27, 1949, provided for Grade A pasteurized milk; that there

is no milk sold today in the City of Madison labeled Grade A, and that there was only one dairy out of five in Madison that could qualify as Grade A (R. 68). *Dr. Kincaid hoped to reach a 90% compliance within a year or so as to make it a Grade A milk shed* (R. 61).

The Circuit Court of Dane County found that the five mile limitation was constitutional, and a reasonable health regulation, that the five mile limitation did not violate the Interstate Commerce Clause of the Fourteenth Amendment to the Constitution of the United States. The trial court based its decision solely upon the decision of the Supreme Court of Wisconsin in the case of *Dyer* v. *City Council of Beloit,* 250 Wis. 613, 27 N.W. (2d) 733. The trial court did *not* find that it was a necessary health measure (R. 54).

As to the twenty-five mile limitation, the trial court held:

> "Dean Milk Company need not be concerned by where its farmer patrons live, so long as Dean is not pasteurizing, and has expressed no intent to pasteurize, within five miles of Madison. The question is completely academic and moot as to where Dean's milk comes from, if Dean is not going to sell in Madison—and Dean cannot sell in Madison without pasteurizing inside the five-mile limit, if Madison's five-mile pasteurization ordinance is valid—and we hereby hold it to be valid" (R. 18).

The Circuit Court of Dane County further held that it was not necessary for the court to pass upon the twenty-five mile limitation, because the Dean Milk Company was not a farmer, owned no farms, and the farmers from whom it purchased its milk were not parties to this action (R. 17).

On appeal the Supreme Court of the State of Wisconsin on June 30, 1950, entered judgment affirming the decision of the lower court, Justice Hughes dissenting.

Other pertinent facts will appear in our argument.

Specification of Errors.

I. That the Supreme Court of the State of Wisconsin erred in finding that the ordinance of the city of Madison, Wisconsin, which reads:

> "7.21. *Pasteurization Plants to be Within Five Mile Radius.* It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the center portion of the City of Madison otherwise known as the Capitol Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health,"

is not a trade barrier and does not violate the right of contract guaranteed under the 14th amendment to the Constitution of the United States and did not deprive the appellant of its property without due process of law and did not deny the appellant the equal protection of the law under the 14th amendment to the Constitution of the United States.

II. That the said Supreme Court of the State of Wisconsin erred in finding that the said Section 7.21 above quoted from the ordinance of the City of Madison, Wisconsin, is not in conflict with Section 8, Article 1 of the Constitution of the United States generally known as the Interstate Commerce Clause of the Constitution.

III. That the Supreme Court of the State of Wisconsin erred in finding that said Section 7.21 of the ordinance of the City of Madison, Wisconsin, above quoted is a reasonable exercise of the police power of the City of Madison, Wisconsin.

IV. That the Supreme Court of the State of Wisconsin erred in not finding that Section 7.11 of the ordinance of the City of Madison, Wisconsin, which reads:

> "7.21 *Permits.* It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin.
>
> "Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit."
>
> "On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capitol Square",

was a trade barrier and deprived the appellant of its property without due process of law, deprived the appellant of its right of contract and denied the appellant the equal protection of the law under the 14th amendment to the Constitution of the United States.

V. That the Supreme Court of the State of Wisconsin erred in not finding that said Section 7.11 of the ordinance of the City of Madison above quoted was in conflict with section 8, Article 1 of the Constitution of the United States commonly known as the Interstate Commerce Clause of the Constitution.

VI. That the Supreme Court of the State of Wisconsin erred in refusing to adjudicate appellant's rights in regard to said Section 7.11 of the ordinance of the City of Madison, Wisconsin; for failing to hold that said Section 7.11 was unreasonable, null and void and in violation of the appellant's constitutional rights under the 14th Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT.

I.

The five mile limitation and the twenty-five mile limitation, each, deprives Appellant of its Constitutional rights under the 14th Amendment and the Interstate Commerce clause of the United States Constitution.

A. The limitations are arbitrary and unreasonable as a matter of fact.

Appellant's milk meets all the requirements of the United States Model Milk Ordinance which is the equivalent of the Madison ordinance, and is inspected by responsible municipal and state governments which inspection is vouched for by the United States Public Health Service.

Three of the appellees' expert witnesses, including their chief health officer, gave expert opinions that milk produced, processed and delivered pursuant to the provisions of the United States Model Milk Ordinance and Code is safe and sanitary for human consumption.

Sec. 7.15 of Madison Ordinance which provides for reciprocal inspection of certified milk belies appellees' contention that reciprocal inspection is not to be trusted for other grades of milk.

Madison's limitations as to milk are just as unreasonable as similar limitations would be in the case of fresh meat.

Madison for years drank ungraded milk. At the time of trial no milk was sold in the city labelled Grade A. Janesville had similar experience until it tore down

the trade barriers and let outside milk in. That compelled the local dealers to clean up and become Grade A for competitive purposes.

It was granted by the trial court that Dean Milk complied with the Chicago Ordinance and Exhibit 3 from the United States Public Health Service proved that the Chicago Board of Health had adopted the recommended milk ordinance and code of the Public Health Service. Over two thousand cities have adopted the United States Model Milk Ordinance and Code.

The terse question is whether the competitive system guaranteed by the due process and the Interstate Commerce Clauses of the United States Constitution is to stand or not. If trade barriers can be built to protect local interest as to milk, they can be extended to fruits, vegetables, meats and other foods on the pretext that only local inspection can be trusted.

B. Madison does not have autonomy to prohibit interstate trade in violation of the United States Constitution.

Madison cannot prohibit interstate commerce because Congress has failed to act upon the subject. This doctrine was denied by this Court in the case of meat long before the federal government undertook the inspection of meat. The Public Health Service in 1922 undertook to take the chaos out of the inspection of milk. Congress has appropriated the money for the work of the United States Public Health Service and that agency's rating or evaluation of milk ordinances and the efficiency of inspection of milk sheds is generally recognized throughout the United States and was adopted and approved by the Wisconsin Department of Agriculture and the Wisconsin State Board of Health on November 15, 1949, by

General Order No. 125. General Order No. 125 declares that milk produced and processed in a milk shed with regulations equivalent to the Model Milk Ordinance and Code complies with "every human health and sanitation requirement" in interstate shipment. The doctrine that the due process clause permits each state to adopt whatever economic policy it deems reasonably necessary to promote its welfare is not applicable in this case because the State of Wisconsin has not authorized any city to grant local monopolies in the milk business and the only expression on the subject by the State of Wisconsin is General Order No. 125 which is diametrically opposed to local monopolies and trade barriers.

C. The five mile and twenty-five mile limitations are not health measures. Madison cannot bar the sale of interstate milk for economic reasons or to make its own inspection less burdensome or because of slight deviations of the Madison Ordinance from the Chicago Ordinance and the Model Milk Ordinance.

Both the trial and Supreme Court of Wisconsin emphasized the fact that Madison was in the center of a great milk producing area. Defendants-appellees admitted that they had taken no steps to inform themselves as to the purity, quality or sanitation of the plaintiff's milk and did not propose to do so. Defendants-appellees alleged that the health officer of Madison could not satisfy himself that milk sold in Madison was meeting the requirements of the Madison Ordinance except by Madison's own continual inspection. Appellees failed to prove it and the trial court made no finding to that effect. The trial and Supreme Courts of Wisconsin treated as immaterial the fact that Dean's milk was produced and pasteur-

ized under ordinances, the equivalent of the Madison Ordinance, and that each step was inspected by the inspectors of responsible municipal and state governments. Both courts took the position that Madison had full discretion in the matter which could not be interfered with by the courts.

The Madison ordinance is not an incidental burden upon interstate commerce but is a prohibition of interstate commerce altogether. The decisions of this court do not permit prohibition of pure, wholesome food shipped in interstate commerce.

The trial court made no finding that there was any substantial upward revision of the Madison Ordinance over the Model Milk Ordinance or the Chicago Ordinance and such finding, if it had been made, would not have been supported by competent and creditable testimony.

The action of the Madison Health Officer in refusing to take any steps to satisfy himself that appellant's product was pure and wholesome was arbitrary and discriminatory.

D. The fact that Dean Milk Company sells its milk through distributors does not deprive it of its Constitutional rights.

The above proposition was thoroughly established by this court in the case of *Savage* v. *Jones*, 225 U.S. 501, 32 S. Ct. 715.

No contention was made in the trial court or the Supreme Court of Wisconsin that the method by which Dean Milk Company distributed and sold its milk deprived it of its constitutional guarantees.

E. The decisions of the state courts except Wisconsin hold the above limitations unconstitutional.

All the decisions of all the courts everywhere have held such limitations unconstitutional on the ground that they are arbitrary, discriminatory, not necessary health measures and violative of the Interstate Commerce Clause of the Constitution.

The Wisconsin Supreme Court relied upon its earlier decision of *Dyer* v. *City of Beloit*, 250 Wis. 613, 27 N.W. 2nd, 733. The later history of that case discredits it as an authority.

II.

The twenty-five mile limitation is a justiciable controversy in this case, and the Supreme Court of Wisconsin in refusing to hold the twenty-five mile limitation unconstitutional, denied the appellant due process of law and the equal protection of the law.

Dean Milk Company obtains its milk from 950 farms located more than twenty-five miles from Madison. The excuses of the Wisconsin courts in refusing to pass upon this limitation that (1) the question was moot so long as the five mile limitations existed, and (2) the 950 farmers were not made party plaintiffs, operates to deny the appellant access to the Wisconsin courts to have its rights declared.

The 950 farmers are not proper parties because they do not propose to sell milk in Madison and the Wisconsin courts would not grant relief anyway even if they were made parties on the ground that the five mile limitation makes the twenty-five mile limitation a moot question.

Failure of the Wisconsin courts to declare this limitation unconstitutional under the circumstances operates to affirm the validity of the twenty-five mile limitation and denies the appellant access to the Wisconsin Courts. Both the five-mile limitation and the twenty-five mile limitation are part and parcel of the same plan to keep outside milk out.

Conclusion.

That the judgment of the Wisconsin Supreme Court should be reversed with directions that the plaintiff be granted the relief prayed for in its complaint in the trial court of Dane County, Wisconsin.

ARGUMENT.

I.

The five-mile limitation and the twenty-five mile limitation, each, deprives Appellant of its Constitutional rights under the Fourteenth Amendment and the Interstate Commerce Clause of the United States Constitution.

A. The limitations are arbitrary and unreasonable as a matter of fact.

Defendants-appellees base their prohibition of interstate commerce upon the proposition that the *five mile limitation was a necessary health measure.* The defendants failed to prove this defense and the court did *not* so find. *Dr. C. K. Kincaid,* Health Commissioner of Madison, testified that the United States Model Milk Ordinance, and Section 11 thereof providing for reciprocal inspection provided adequate and reasonable means for insuring pure, wholesome and sanitary milk and milk products; the same testimony was repeated by another defense witness, Clarence Luchterhand, Milk Sanitarian for the Wisconsin State Board of Health. He went much further. *He stated the Wisconsin Board of Health recommends the United States Model Milk Ordinance to the cities of Wisconsin for adoption* (R. 150). *Further, the Wisconsin Board of Health and Wisconsin Department of Agriculture are now working on a program with the United States Public Health Service to obtain a United States Public Health Grade A label for Wisconsin milk so that it can flow freely in interstate commerce. It was adopted as General Order* 125 *of the Wisconsin Department of Agricul-*

ture, with the approval of the Wisconsin State Board of Health. The irony of the situation is that the government of Wisconsin's capital city pretends to believe that it is necessary to wall the city in and keep out interstate commerce although the appellees were unable to find any expert witness that would testify to it. *Madison's own city ordinance belies their position for Section* 7.15 *of the Madison Ordinance reads*:

> "Certified milk and Grade 'A' Raw Milk for Pasteurization (1) Definitions. (a) Certified milk is milk which conforms with the requirements of the American Association of Medical Milk Commissions in force at the time of production and is produced under the supervision of a medical milk commission and of the State Board of Health or of the City Health Commissioner of Madison" (R. 249-250).

Thus we find Madison delegating to others the function of inspection of the highest type of milk provided for in its ordinance (R. 161) without the "protection" of the five-mile and twenty-five mile limitation, which the city now contends is so vital for ordinary milk.

In fact, Madison copied that section of its Ordinance from the United States Model Milk Ordinance (R. 171).

We are now compelled to ask how the appellees can contend that such trade barriers are reasonable when the Health Commissioner of Madison, Dr. Kincaid, testified that the reciprocal inspection method set forth in Section 11 of the Model Milk Ordinance provides adequate protection to insure wholesome and sanitary milk; and said fact is confirmed by another defense witness, Clarence Luchterhand, Sanitarian for the Wisconsin State Board of Health? Such contention violates reason and is a farce.

The United States Public Health Service in conjunction with the *State Board of Health evaluates the inspection*

of the various milk sheds and makes this information available free of charge.

Dr. Kincaid, Madison's Health Commissioner, *Edward R. Friday,* Senior Milk Sanitarian of the Madison Health Department, and *Clarence Luchterhand,* Milk Sanitarian of the Wisconsin Board of Health, *all three defense witnesses*—expressed their full confidence in the adequacy of the United States Public Health Service Regulations. The trial court obviously erred or misunderstood the point of this matter. He viewed it as a sectional matter only on which he proposed to guard the jealous pride of one community against that of another. He stated:

> "One municipality does not have to sacrifice its standards to those of another community which may be lower nor is one governmental unit necessarily compelled to yield its independence to another, even though the latter's gauges of inspection purport to be equal or slightly higher" (R. 7).

That is not the point at all. One community is not yielding its independence to another. Surveys of the inspection service are made and graded by the United States Public Health Service. If the grade is 90 per cent or better, then the receiving community may rest assured (quoting from "The Methods of Making Sanitation Ratings of Milk Sheds" which appellees' own witness Luchterhand uses as a hand book as milk sanitarian for the Wisconsin State Board of Health) that:

> "Nevertheless, a pasteurized milk rating of 90 per cent determined as previously described does mean that the pasteurized milk supplies in general of the community in question are as safe as a reasonably strict enforcement of the milk ordinance recommended by the Public Health Service will make them. Citizens who limit their purchases of milk to Grade A pasteurized milk secured from communi-

> ties with 90 per cent ratings may, for all practical purposes, ignore the danger of milk-borne infection. The safest communities from the standpoint of milk-borne disease are those in which all milk is pasteurized and in which the pasteurized milk rating is 90 per cent or more" (R. 148).

If Madison can draw a 25 mile barrier around itself as to milk, why can it not do the same as to fresh meat? According to defendants' witness Nichols, fresh meat is subject to contamination just the same as milk (R. 160). Why does Madison have to yield its independence to meat packed in Chicago, just because it bears a federal inspection label on it? Why can not Madison prohibit the sale of all meat except that produced and processed in Dane County? The answer is because the Interstate Commerce Clause was intended to level all local trade barriers built on local pride and for the protection of local interest against competition.

In *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 330, 64 S. Ct. 1023, (1926) this court said:

> "The very purpose of the Commerce Clause was to create an area of free trade among the several states."

The record shows without contradiction that Madison has for years, and still is, forced to drink ungraded milk. The same was true of Janesville until Janesville tore down the trade barrier and let in outside competition. The testimony of the Janesville milk inspector supports this contention, he having said:

> "Before Janesville adopted the new ordinance, outside milk could not be brought in. Under the old ordinance, we were never able to obtain Grade A pasteurized milk in Janesville. We did obtain Grade A milk under the new ordinance. The reason for

that was Dean Milk coming in to Janesville marked Grade A practically compelled our dealers to do likewise, and become Grade A for competitive purposes" (R. 90).

The trial court also stated:

> *"It is granted your company complies with the Chicago Ordinance and that you have good milk"* (R. 75).

And the United States Public Health Service in Exhibit 3, stated as follows:

> "The Dean Milk Company operating under permit from the Chicago Board of Health, *which has adopted the recommended milk ordinance and code of the Public Health Service* • • •" (R. 195-196).

We now find defendants' expert witnesses testifying that the United States Model Milk Ordinance and code is sufficient, and surely it is, because it has been adopted by 2000 cities—then why should Dean be barred from Madison when it stands admitted its products are wholesome and meet the test?

The terse question is whether the competitive system guaranteed by the due process and the Interstate Commerce Clauses of the Constitution is to stand or not. Or shall it be whittled away on one flimsy pretext or another? If trade barriers can be built to protect local interest as to milk, why can not they also be extended to fruits, vegetables, meats and other foods on the pretext that only local inspection can be trusted?

We say that such trade barriers are arbitrary and unreasonable as a matter of fact. They constitute a pernicious invasion of constitutional rights and guaranties and violate the spirit and letter of the commerce clause.

B. Madison does not have autonomy to prohibit interstate trade in violation of the United States Constitution.

On this subject the trial court erroneously stated:

> "The City of Madison—in the public concern over health—has an autonomy, a measure of local self-government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet" (R. 7).

The above pronouncement is based upon the mistaken idea that the States and their subdivisions may regulate or prohibit interstate commerce until Congress acts upon the subject. Such is not the law. The absence of State and federal legislation does not make Madison a privileged character. The Commerce Clause, *per se*, prohibits Madison from interfering with interstate commerce. The authorities in point are legion.

In *Freeman* v. *Hewit*, 329 U.S. 249, 67 S. Ct. 274, 276:

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the *States, but by its own force created an area of trade free from interference by the States.* In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915; *Morgan* v. *Virginia*, 328 U.S. ...., 66 S. Ct. 1050. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for

hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.

These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense." (Italics ours.)

Again, in *Carter* v. *Commonwealth of Virginia*, 321 U. S. 131, 64 S. Ct. 464 at page 137 of U. S. Rep. and 468 of S. Ct. Rep., the court said:

"That clause remains in the Constitution as a grant of power to Congress to control commerce and as a diminution *pro tanto* of absolute state sovereignty over the same subject."

And in *Southern Pac. Co.* v. *State of Arizona*, 325 U.S. 761, 769, 65 S. Ct. 1515, 1520, it was said:

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."

The proposition relied upon by the Supreme Court of Wisconsin that a local government may prohibit the law-

ful importation of articles in interstate commerce so long as Congress has not acted upon the subject has been clearly refuted by this Court. The case of *State of Minnesota* v. *Barber*, 136 U.S. 313, 34 L. Ed. 455, involved the sale of fresh meat. It is common knowledge that fresh meat is subject to contamination to an equal extent as milk, and the defendants' witness, Nichols, so testified in the case at bar (R. 160). The Minnesota statute prohibited the sale of fresh meat in Minnesota unless the animal had been inspected in Minnesota before slaughter. Barber was convicted of selling meat in Minnesota which had been slaughtered in Illinois. The State of Minnesota argued that it could not be determined whether or not the animal was healthy by merely inspecting the meat when it was offered for sale, and that the same could only be determined by inspection before slaughter. It also contended that it had a right to have this fact determined by its own inspectors and that it was too inconvenient and expensive for its inspectors to go to Illinois and other states to inspect animals before slaughter. This contention was rejected by this Court, and this Court stated at page 458:

> "On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. * * * When to this is added the fact that the Statute, by its necessary operation, prohibits the sale, in the State, of fresh beef, veal, mutton, lamb or pork, from animals that may have been inspected carefully and thoroughly in the State where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several States. *It*

> *will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food.* If the object of the Statute had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from animals slaughtered outside of that State, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the Act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota Statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota, as interferes and burdens commerce among the several States, it would be difficult to enact legislation that would have that result."

In *Brimmer* v. *Rebman*, 138 U.S. 78, 34 L. Ed. 862, the court held unconstitutional the statute of the State of Virginia which provided for inspection of meat that was transported more than one hundred miles after slaughter and for an inspection fee of one cent a pound. Rebman was convicted for the sale of meat from animals slaughtered in Illinois. The United States Supreme Court held the Virginia statute unconstitutional. The Court stated:

> "Is the Statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. The Statute is, in effect, a prohibition upon the sale

in Virginia, of beef, veal or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete, upon equal terms, in the markets of that Commonwealth, with those in the same business, whose meats, of like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, is thus made to depend entirely upon the place where the animals, from which the beef, veal or mutton is taken, were slaughtered. Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting Inspection Laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State, is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void."

The case of *Miller* v. *Williams*, 12 Federal Supp. 236 held unconstitutional a regualtion of the Health Commissioner of Baltimore City which prohibited the use or sale of cream for the manufacture of ice cream produced by dairies situated more than fifty miles from the City limits. The plaintiff, a citizen of Pennsylvania, with principal place of business at Philadelphia, sought an injunction against the regulation. The City defended upon the ground that "there are more than 4,000 dairy farms within the 50 mile limit from Baltimore and the number of available inspectors is, as a matter of reasonable expense, necessarily limited. With regard to distantly located dairy plants, for instance those in Wisconsin, it is said to be impossible to make such frequent inspections and to carry on such educational work as is possible within a limited distance from Baltimore City." Judge Chestnut held the regulation to be in conflict with both the Due Process and Interstate Commerce Clauses of the Constitution. In his opinion, he stated:

> "In my opinion the regulation is invalid, when attacked as unreasonable by a directly interested party producing milk within the State of Maryland (in the absence of a state statute) outside the zone or from the point of view of being a direct burden upon interstate commerce. From the latter aspect, the applicable principles of constitutional law are now well settled. Freedom of commerce between the states is the rule and not the exception. Under the Constitution it may be regulated by Congress but unless otherwise specifically so regulated, the states may exercise their police power by statute and may authorize their municipal corporations to do so by ordinances, provided the latter are reasonably adapted to the legitimate end of protecting the health, morals and welfare of the community. But

when local regulations under the guise of police power are not reasonably adapted to accomplish these legitimate ends and constitute a direct burden upon interstate commerce, they must fall, 12 C. J. 52, 60, 81. The principle here involved has been very recently applied by the Supreme Court of the United States to interstate shipments of milk in the case of *Baldwin, Commissioner* v. *Seelig*, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032. There a statute of New York which required a minimum price to be paid producers of milk within the State and further provided that no milk from other states should be sold in New York unless the same minimum prices were paid to producers in foreign states, was held unconstitutional as applied to interstate shipments of milk from Vermont, when sold in the original package, whether in the cans in which transported or as milk bottled therefrom. Said Mr. Justice Cardozo (294 U. S. 511, pages 521, 522, 55 S. Ct. 497, 499, 79 L. Ed. 1032):

'New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. * * * Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed, by an express prohibition of the Constitution, beyond the power of a state, "except what may be absolutely necessary for executing its inspection Laws." Constitution, art. 1, § 10, cl. 2; *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. Ed. 382. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. 1 §8, cl. 3. "It is

the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." * * * Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation."'

* * *

"If the principle of this regulation is once established as to milk it could seemingly be extended to other food products such as vegetables, fruits and meats, which are likewise subject, although perhaps in less stringent degree, to food inspection and exclusion laws, but only when reasonable. * * * The result might well be that Baltimore would be made an isolated sanitary area for much of its food supply, although it is certainly not intended to suggest that such an unreasonable extension of the principle is at all likely to be proposed by our very efficient Health Commissioner. The principle, however, is one that runs directly counter to the constitutional freedom of the interstate commerce."

* * *

"The real objection of the Health Department to the foreign cream is based on the alleged impracticability of adequate and effective supervision by its own representatives of the dairy farms which produce the milk supply from remotely situated foreign dairy plants. This of itself is not a sufficient basis for excluding the cream although very probably it

would support regulations of a somewhat different nature than those applicable to the local supply which would afford every reasonable assurance to the Health Commissioner for the protection of the health of the community."

The case of *State of Minnesota* v. *Barber*, 136 U. S. 313, 34 L. Ed. 455, was decided in 1890, long before the Federal Government undertook to inspect meat in 1907. (21 U.S.C.A. Sec. 71, etc.)

It therefore follows that the argument that local government can absolutely prohibit the importation of perishable foods in interstate commerce in the absence of Congressional action to the contrary is not the law.

But we contend that Congress has taken some action in the milk situation. It is true that it has not taken the same type of action as in the case of meat. But Congress has appropriated the money and authorized the establishment of the United States Public Health Service in the Treasury Department. In 1922, the United States Public Health Service undertook to take the chaos out of the milk situation. At that time, a good many municipalities and states were inspecting milk, and instead of the Federal Government taking over directly the work of inspecting milk, it inaugurated a system of evaluating, or inspecting, the inspectors. Congress has continued to appropriate money for this service furnished by the Public Health Service, and the service has grown throughout the years. The proficiency of this service has become recognized throughout the United States. The State of Wisconsin by General Order 125 has declared that the system is not only sufficient but will "insure consumers throughout the United States that when they buy Wis-

consin Grade A milk, they are getting milk which meets every human health and sanitation requirement."

Now we submit that there is substantially no difference between the meat situation and the milk situation. In the case of meat, the Federal Government placed its own inspectors in the meat packing concerns, beginning in the year 1907. But by the year 1922, the Federal Government and the states and municipalities had developed a system of cooperation, so that in the case of milk, instead of the Federal Government furnishing the inspectors, it furnished a system that would evaluate and grade the local inspection, and furnish the information free of charge. Further, the Federal Government has established by the Model Milk Ordinance, standards so that milk which is stamped U. S. Grade A is milk, according to defendants' own witnesses, which is safe and sanitary, and according to the Wisconsin State Board of Health and the Department of Agriculture, "meets every human health and sanitation requirement," regardless of where it is produced in the United States. The Act of Congress establishing the Public Health Service and its functions is set forth in 42 U.S.C.A., Sec. 201 etc.

In their statement in opposition to jurisdiction by this Court, appellees argue that the Wisconsin Department of Agriculture does not have authority to prescribe regulations for cities in the State of Wisconsin. That is true. But what we are discussing here are health standards which are generally recognized in the milk industry and have been adopted by the State of Wisconsin insofar as the State of Wisconsin has acted upon the subject. The State of Wisconsin by General Order 125 has declared that milk certified as Grade A by the United States

Public Health Service "meets every human health and sanitation requirement" in interstate shipment. In other words, if it is all right for the other fellow, then why is it not good enough for the inhabitants of Wisconsin, including Madison? How can the State of Wisconsin adopt a policy declaring such milk pure and wholesome, when offering it for sale to citizens of other states, and at the same time maintain that milk having equal certification should be barred from coming into Wisconsin, because otherwise it would endanger the health of the citizens of Wisconsin? The answer is that such a contention is deception and hypocrisy.

The appellees in their statement in opposition to jurisdiction cite the case of *Nebbia* v. *N. Y.*, 291 U. S. 502, 54 S. Ct. 505, for the proposition that so far as the due process clause is concerned, a state is free to adopt whatever economic policy may reasonably be deemed necessary to protect or promote its public welfare. The answer to this contention is that the State of Wisconsin has not enacted a statute which puts milk dealers in the class of a public utility. In other words, there is no statutory policy in Wisconsin which creates or authorizes any city to create a monopoly in favor of local milk dealers. The only expression on the subject by the State of Wisconsin has been General Order 125, and that diametrically opposes local monopolies.

C. The five-mile and twenty-five mile limitations are not health measures. Madison cannot bar the sale of interstate milk for economic reasons or to make its own inspection less burdensome or because of slight deviations of the Madison Ordinance from the Chicago Ordinance and the Model Milk Ordinance.

The emphasis of both the trial court and the Supreme Court of the fact that Dane County is a large milk pro-

ducing county, and that it produces more than ten times the milk used in the city of Madison gives the key to the decision and the purpose of the Ordinance. The purpose of the limitations in the Ordinance is economic protection, and these regulations are not health measures.

This Court stated in *H. B. Hood & Sons* v. *Dumond*, 336 U. S. 525, 531, 69 S. Ct. 657, at page 531-532:

> "Our decision in a milk litigation most relevant to the present controversy deals with the converse of the present situation. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032, 101 L.R.A. 55. In that case, New York placed conditions and limitations on the local sale of milk imported from Vermont designed in practical effect to exclude it, while here its order proposes to limit the local facilities for purchase of additional milk so as to withhold milk from export. The state agreed then, as now, that the Commerce Clause prohibits it from directly curtailing movement of milk into or out of the State. But in the earlier case, it contended that the same result could be accomplished, by controlling delivery, bottling and sale after arrival, while here it says it can do so by curtailing facilities for its purchase and receipt before it is shipped out. In neither case is the measure supported by health or safety considerations but solely by protection of local economic interests, such as supply for local consumption and limitation of competition. This Court unanimously rejected the State's contention in the *Seelig* case and held that the Commerce Clause, even in the absence of congressional action, prohibits such regulations for such ends."

In the case at bar the City of Madison drew two circles around itself, and absolutely prohibited all commerce originating beyond the limits of the circles. The first circle has a radius of five miles from the center of the

city, and declares that all milk not pasteurized within that radius is prohibited from being sold within the City of Madison. The second circle has a radius of twenty-five miles, and prohibits the sale of any milk in the City of Madison that is not produced on farms within that zone. It is true that as to the second circle, the City Ordinance purports to place a discretion in the Health Department by stating that the Health Department will not be obligated to inspect farms beyond the twenty-five mile limit, but the fact is that the Health Department will not inspect farms beyond the twenty-five mile limit, and milk which is obtained beyond that limitation cannot be sold in the City of Madison. The defendants state in their answer as follows:

> "Defendants admit they have taken no steps to satisfy themselves as to the purity, quality or sanitation of the plaintiff's milk and further admit that they do not propose to do so and that they claim they have the right not to do so, and further have the right to refuse to grant any license to the plaintiff because the plaintiff's milk is not pasteurized within the five mile zone as provided in the Madison City Ordinances, * * *." (R. 40-41).
>
> "Defendants deny that the health officer of the City of Madison could by any means other than continual inspection of the plaintiff's plants and of the *several hundred farms* which deliver to those plants satisfy himself that the plaintiff's milk is being produced, pasteurized and distributed in the manner required by the ordinances of the City of Madison, and defendants allege that such continual inspection would create undue expense and inconvenience to the City of Madison." (R. 42).

Notwithstanding appellees' allegation that continual inspection by Madison was necessary to insure pure and

wholesome milk for her inhabitants, appellees failed to prove it. The allegation is based upon the false assumption that no health officer or milk inspector, even though their work was vouched for by the United States Public Health Service, could be trusted except Madison's. The trial court made *no* finding that continual inspection by the City of Madison was necessary to insure the purity and sanitation of milk to be sold in Madison. In fact the trial court and the Supreme Court of Wisconsin treated the point as wholly immaterial.

Here is what the trial court said:

> "Dean's position on interstate commerce is set forth concisely in its reply brief (P. 6) in the present case:
>
> 'The test is, is the food or milk which the plaintiff proposes to sell a pure, wholesome product? If it is, it cannot be barred from interstate commerce.'
>
> "But the Supreme Court did not agree with this argument in the *Beloit* case, for with equal conciseness the court stated (P. 619):
>
> 'This ordinance does not violate the interstate commerce clause of the United States Constitution. Milk may be furnished from farms and pasteurization plants in the State of Illinois as well as in the State of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which Congress has not sought to deal, leaving the City of Beloit free to act in the exercise of its police powers.' " (R. 12).

The Supreme Court of Wisconsin affirmed the trial court and stated in its opinion:

> "The plaintiff contends that its inspection, with that of the Chicago Board of Health and spot checks by the United States Public Health Service, results in a product that is clean, pure and wholesome, and

that it should be permitted to flow freely to market unburdened by duplication of inspection, and that the restrictions in the Madison Milk Ordinance are prohibitive trade barriers and therefore unconstitutional under the 14th Amendment and the Interstate Commerce Clause of the United States Constitution. *The courts of some states have so held.* This court has held otherwise in *Dyer* v. *City Council of Beloit,* 250 Wis. 613, 27 N.W. 2nd 733, in which it held valid an ordinance of the City of Beloit which contains the following provision:

'No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grant Avenue in the City of Beloit.' "

We submit that the only fair inference that can be drawn from the above pronouncements of the trial and Supreme Court of Wisconsin is the doctrine that admission of milk in interstate commerce is a matter solely within the jurisdiction of the local authorities, and that it makes no difference how pure and wholesome or how thorough the inspection of the outside milk may be.

The mere statement of the proposition is its best refutation.

Counsel for the appellees in their statement in opposition to jurisdiction sought to bolster the Wisconsin Court's pronouncement by a quotation from the case of *Milk Control Board of Pa.* v. *Eisenberg Farm Products,* 306 U.S. 346, 69 S.Ct. 528, to the effect that every state police statute necessarily affects interstate commerce to some extent, but that such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce.

The answer to that is that we are not dealing with a mere incidental burden upon interstate commerce. The sections of the Madison ordinance in question *prohibit interstate commerce altogether.*

Counsel for the appellees in their statement in opposition to jurisdiction by this Court attempted to further bolster the doctrine of the state Court by a quotation from *H. P. Hood & Son* v. *DeMond,* 336 U.S. 525, 531, 69 S.C. 657, 662, to the effect that a state may protect its inhabitants against perils to health, safety and fraudulent traders.

The answer to this proposition is that the Madison ordinance absolutely prohibits interstate commerce without regard to any question of health, safety or fraudulent traders. This Court has held in the case of *Schollenberger* v. *Pa.,* 171 U.S. 1, 18 S.Ct. 757, 43 L.Ed. 49, that a state may bar impure food or dangerous articles but it cannot bar from interstate commerce pure and wholesome food. This case struck down a Pennsylvania statute as being violative of the interstate commerce clause which prohibited the introduction and sale within Pennsylvania of oleomargarine. At page 12, Mr. Justice Peckham, speaking for a majority of the Court, stated:

> "The general rule to be deduced from the decision of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. *A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.*
>
> In *Minnesota* v. *Barber,* 136 U.S. 313, *it was held that an inspection law relating to an article of food*

was not a rightful exercise of the police power of the state if the inspection prescribed were of such a character or if it were burdened with such conditions as would wholly prevent the introduction of the sound article from other states. This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-called inspection law. The principle was affirmed in *Brimmer* v. *Rebman,* 138 U.S. 78, and in *Scott* v. *Donald,* 165 U.S. 58, 97 (41: 632, 644).

Is the rule altered in a case where the inspection or analysis of the article to be imported is somewhat difficult and burdensome? Can the pure and healthy food product be totally excluded on that account? No case has gone to that extent in this court. The nearest approach to it was the case of *Peirce* v. *New Hampshire,* 46 U.S. 5 How. 504, involving the importation of intoxicating liquors. But in *Leisy* v. *Hardin,* 135 U.S. 100, the New Hampshire case was overruled, and it was stated by the present Chief Justice, in speaking for the court, that 'whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Con-

gress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create.'

To the same effect, we think, is the case of *Hannibal & St. J. Railroad Company* v. *Husen*, 95 U.S. 465, in which it was said that 'whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations.' The court, therefore, while conceding the right of the state to enact reasonable inspection laws to prevent the importation of diseased cattle, held that the law of Missouri there under consideration to be invalid, because it prohibited absolutely the introduction of Texas cattle during the time named in the act, even though they were perfectly healthy and sound.

The court said that a state could not, under the cover of exercising its police powers, substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, were admitted to be valid, but absolute prohibition of an unadulterated, healthy, and pure article has never been permitted as a remedy against the importation of that which was unadulterated and therefore unhealthy or impure.

We do not think the fact that the article is subject to be adulterated by dishonest persons in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any state through its legislature to forbid the introduction of the unadulterated articles into the state. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be mixed may possibly and under some circumstances be deleterious to the health of those who consume

them, is known to us by means of various references to the subject in books and encyclopedias, but there was no affirmative evidence offered on the trial to prove the fact. From these sources of information it may be admitted that oleomargarine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one."

Dr. Fauerbach, the assistant health officer of Madison in charge chiefly of the examinations and immunizations in the Madison schools, compared the Madison Ordinance with the Chicago Ordinance and found some slight differences. These differences were so trifling that the trial court in disgust stated:

"We shall not exhaust brain tissue on such wanderings (R. 5). * * * These details as to how to produce, and care for milk do not hit the constitutional issue of the five mile limit at all, as we view it" (R. 6).

The case of *Urban* v. *Taylor* (N.J.) 188 Atl. 232, deals not only with the above excuse but also with defendants' other excuses in the case at bar that there is sufficient milk in Dane County and that it would be too expensive and inconvenient for Madison to inspect Dean's plants and farms. The New Jersey Court stated:

"The town refused prosecutor's application because it would entail too great a financial burden to inspect

the source of supply. The Port Murray Dairy Company sells and distributes about 25,000 quarts of milk daily in various parts of North Jersey. It is supervised by the State Department of Health, and is inspected and approved by many municipal health boards. * * * Subsequently, the local board stated that it would refuse a permit because the town had already a sufficient supply to satisfy the needs of its inhabitants.

"The facts and circumstances in this case seem on all fours with *Sheffield Farms Co., Inc.* v. *Seaman*, 114 N.J. Law, 455, 177 A. 372, 375.

"It clearly appears that the refusal of the permit was without substance and is not predicated upon any desire to conserve the public health and safety. Mere lack of funds to investigate a source of supply is not sufficient reason to justify the refusal of a permit, in view of the circumstance that there seems to have been adequate inspection by state inspectors. Further, because the town already has a sufficient number of milk dealers presents no valid reason for a refusal of the permit requested."

On the ground, that the town had set up slightly different standards as to butter fat and bacteria count, the Court held that that was but an excuse, and not a legal reason, stating:

"It has been urged that in this case there has not been an exact compliance with the town requirements. The proofs clearly show reasonable compliance with the provisions of the ordinance essential to conserve the public health and safety. A local board of health, by incorporating in its ordinances arbitrary and unnecessary provisions, cannot preclude the prosecutor from engaging in a lawful business, merely on the theory that his milk and cream contains slightly less butterfat or the bacteria count is slightly different."

The Court further stated (which seems apropos to the case at bar), quoting from the *Sheffeld Farms* case:

> "Suffice it to say that the meager facts, relevant as to the occasion and history of the refusal, lead us to the conclusion that they are without substance. They are excuses rather than legal reasons. The city just took the position that it had enough milk dealers and that it had the situation 'well in hand.' Such a position is unreasonable; it is arbitrary, capricious, and discriminatory. It unlawfully curtails prosecutor's common-law right to engage in a lawful business, notwithstanding that it has fully complied with the requirements of the state and city. This the city cannot lawfully do."

If the appellees' position in the case at bar is correct, that a city may make some slight additional requirement, then of course a way has been devised of putting out of business a large milk company which deals in more than one city. Each city could make some slight difference in their ordinance and bar the company from doing business. For example, one city could require that the breezeway be left open, and the other require that it be closed. The answer to all of that is that this is not the test. The test is, whether the food or milk which the plaintiff proposes to sell is a pure, wholesome product? If it is, it cannot be barred from interstate commerce. The fact that more milk is produced in Dane County than is consumed in Dane County is no legal or health reason why interstate commerce should be barred. The defendants' argument in this respect shows the real motive is to prevent the plaintiff from selling milk in Madison for the purpose of avoiding local competition.

D. Action of Madison Health Commissioner in refusing to make any effort to satisfy himself that plaintiff's milk complied with Madison requirements was arbitrary, unreasonable and discriminatory.

On March 8, 1948, Dean applied for a milk license. On March 12, 1948, the Health Commissioner wrote Dean that its application was denied.

Defendants' answer to the second amended complaint alleges:

> "Defendants admit they have taken no steps to satisfy themselves as to the purity, quality or sanitation of the plaintiff's milk and further admit that they do not propose to do so and that they claim they have the right not to do so and further have the right to refuse to grant any license to the plaintiff because the plaintiff's milk is not pasteurized within the five mile zone as provided in the Madison City ordinances, and *also for other reasons*" (R. 40-41).

City of Greenville v. *Cabell's, Inc.* (Texas), 207 S.W. 2d, 898, was a suit by Cabell's, Inc., against the City of Greenville, *et al.*, for injunction against interference with the plaintiff's sale of milk in the city of Greenville. Judgment was entered for the plaintiff, and defendants appealed. The judgment below was affirmed. In this case, plaintiff made an application, like plaintiff here, to sell Grade A pasteurized milk within the city of Greenville. The health officer, there as here, did nothing about the matter, except to refuse to issue a permit. At page 900, the court stated that the health officer (between August 20, 1947, and September 23, 1947), made no inspection and did nothing except to make a trip to Austin for a conference with the state health officer, and then wrote a

letter to the health officer at Dallas. The court in its opinion said:

> "Dr. Jenks has made no investigation of Cabell's plant in Dallas, which the record shows to be about fifty miles distant from Greenville, nor has he conducted any investigation with reference to the source of Cabell's milk supply. On the other hand the record shows that Cabell's milk is Grade A pasteurized and Grade A pasteurized homogenized; that Cabell sells milk and milk products in the city of Dallas and several surrounding cities; that said plant and source of supply are examined by inspectors, both of the state and the city of Dallas at regular intervals; that its milk products have passed state and Federal inspections, and are being transported in interstate commerce."
>
> "Under the milk ordinances of said city, all that concerns Dr. Jenks and the city of Greenville is whether Cabell's milk and milk products meet the standard as fixed for said city in its milk code and ordinances. These facts, in our opinion, are amply shown by the record, as outlined above. Dr. Jenks testified that he had refused Cabell a permit, and another part of his testimony shows that he had failed to grant it a permit to sell milk and milk products in the city of Greenville. In a situation where a city health officer fails, after reasonable time to make a proper inspection in order to determine whether or not a permit to sell milk in the city should be granted, or whether he refuses a permit, an issue of fact is then presented for a court to hear and determine the issue, and when it is shown, as here, that Cabell's products met the requirements of the city milk code, then its right to a permit becomes clear, and a refusal to grant it, under such circumstances, becomes arbitrary."
>
> "Milk and other dairy products are legitimate subjects of commerce, and the right to sell them should

not be abridged by legislative boards further than reasonable to protect and safeguard the public health."

This language can be paraphrased here. It is apropos for defendants' witness, Luchterhand, sanitarian for the Wisconsin State Board of Health, testified that the State Board of Health recommended the Model Milk Ordinance. It was shown beyond dispute that the plaintiff's milk and milk products met all the requirements of the Model Milk Ordinance, and that it is regularly inspected by the city of Chicago, complies with the Grade A milk law of the State of Illinois, and although the defendant tried to show some slight differences between the Madison code and the Chicago code, yet no witness that the defendants produced would testify that the milk produced pursuant to the Chicago code and the Model Milk Ordinance was not pure, wholesome and sanitary. On the other hand, the defendant Dr. C. K. Kincaid, who is the health officer of Madison, testified that in his judgment the milk produced under the Model Milk Ordinance Exhibit 1 (not including the amendments, Exhibit 2) was safe from a health standpoint, and that he recommended to the city council either Sec. 11 or the provisions for limitations on plants and farms. In substance and fact Dr. Kincaid was satisfied that the reciprocal clause is a sufficient method to insure pure, wholesome milk. We thus have in this case the City of Madison barring the plaintiff's milk and milk products from sale within the city (which milk is shown to be pure, wholesome and sanitary), in direct violation of the Interstate Commerce Clause, when there is a simple and common method by which the City of Madison can now insure itself without any cost that the plaintiff's milk and milk products are being produced and pasteurized under sanitary methods; all of which

is perfectly satisfactory to its chief health officer, Dr. Kincaid. Such proof shows unreasonable and arbitrary action in fact.

It is admitted that plaintiff made application on March 8, 1948, and defendants admit in their answer of having made no effort whatsoever to satisfy themselves as to the purity and wholesomeness of plaintiff's products; and say they *do not propose to do so.* Under the above cited Texas case, the plaintiff is entitled to a declaratory judgment and a mandatory injunction giving it a right to sell its milk and milk products in the city of Madison without interference on the part of the defendants.

The defendants' action has become more arbitrary in view of Section 7.25 of the new ordinance of August 27, 1949, which reads:

> 7.25. *Enforcement Interpretation.* This ordinance shall be enforced by the Health Commissioner *in accordance with the interpretations thereof contained in the current edition of the United States Public Health Service Milk Code,* a certified copy of which shall be on file in the City Clerk's office; *Provided,* that in case of upward revisions, the provisions shall be interpreted according to the provisions expressed in this ordinance (R. 272).

In *City of Wenoka* v. *Rose Lawn Dairy* (Okla.) 212 P. (2d), 1056, the facts and situation were quite similar to the case at bar. The court held that such action on the part of the Health Officer was arbitrary; and that when the applicant's milk comes from a milk shed with a United States Public Health Service rating of 90 per cent or more the local health officer must accept it and can not take the position that he has not the funds or time to inspect himself.

E. The fact that Dean Milk Company sells its milk through distributors does not deprive it of its Constitutional rights.

On page eight of appellees' statement in opposition to appellant's statement of jurisdiction and motion to dismiss or affirm is contained the following statement:

> "The Dean Milk Company does not transport milk to or sell milk in the City of Madison or Dane County, nor does it propose to. It sells bottled, pasteurized milk to Robert Alder at Chemung, Illinois. Robert Alder transports the milk in his own refrigerated truck and sells it to stores in Wisconsin, including various communities in Dane County (R. p. 103)."

This same contention was made, and rejected by this Court in the case of *Savage* v. *Jones*, 225 U. S. 501, 32 Sup. Ct. 715, at page 720, where it is stated:

> "It is said that the complainant is not entitled to invoke the constitutional protection, in that he fails to show injury. * * * The argument rests upon the averment in the bill that his sales were made at Minneapolis, the goods 'to be delivered free on board of cars' at that point, 'and delivered to purchasers and consumers within the state of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers.' In answer, it must again be said that 'commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' * * * It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another state. His product manufactured in Minnesota was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. The protection accorded to

this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages. * * * An attack upon this right of the importing purchasers to sell in the original packages brought from the complainant not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales, —a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the state chemist had threatened the complainant that, in default of such compliance, he would cause the arrest and prosecution of every person dealing in the article within the state, and had distributed broadcast throughout the state warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief against enforcement by the defendant of the illegal demands."

No contention was made in either the trial court or the Supreme Court of the State of Wisconsin that the method by which the Dean Milk Company distributed and sold its milk deprived it of the constitutional guarantees.

The record at 103-104 shows that the milk proposed to be sold in Madison is delivered in the original packages as it leaves the Dean plant at Chemung, Illinois. It was the Dean Milk Company that applied for a license to sell its milk and milk products in the City of Madison, Wisconsin, and it was denied a license on the ground that its milk was not pasteurized within five miles, as provided by Sec. 7.21 of the Madison Ordinance, and that its milk was not produced on farms located within twenty-five miles, as provided by Sec. 7.11 of the Madison Ordinance.

We contend that the method by which the Dean Milk Company sells its milk is immaterial. We contend that the Dean Milk Company has a constitutional right to sell its milk in Madison, Wisconsin, and it makes no difference whether it sells its milk directly or through distributors. The above case from this Court supports our contention.

F. All decisions of the State Courts except Wisconsin hold the above limitations unconstitutional.

We have carefully read every case on the subject and not one single case has held such or similar restrictions constitutional. All such ordinances have been held unconstitutional as a violation of both the Fourteenth Amendment and the Interstate Commerce Clause of the United States. The cases holding such ordinances unreasonable, null and void are as follows:

In *Dean Milk Company* v. *City of Waukegan*, (Ill.) 87 N.E. (2d) 751 (1949), the Illinois court not only held that the city has exceeded the statute, but that the regulation was *unreasonable*. Analysis of the Illinois cases shows that the cities may regulate under the Illinois Statutes so long as the regulations are reasonable. A violation of the Illinois Statute is also a violation of the Constitution. The *Waukegan* case held unconstitutional a city ordinance which barred the sale of milk in Waukegan which was not pasteurized and *produced* in Lake County, Illinois.

In *Higgins* v. *City of Galesburg*, (Ill.) 81 N.E. (2d) 520, held unconstitutional the city ordinance which barred the sale of milk not pasteurized within ten miles of the City of Galesburg.

In *State ex rel. Larson* v. *City of Minneapolis,* 190 Minn. 138, 251 N.W. 121, the court held unconstitutional the city ordinance of Minneapolis, which provided that milk could not be sold in Minneapolis unless it was pasteurized within the city limits. In that case, 97% of the milk and 99.1% of the cream consumed in the city were pasteurized in plants located within the city limits. The defense was made that it would place an undue burden upon the city to inspect the plaintiff's plant, which was located thirty miles from the city.

Again, in *Sheffield Farms Co., Inc.* v. *Seaman,* 114 N.J. L. 455, 177 A. 372, held it was arbitrary and illegal to bar the sale of plaintiff's milk in Perth Amboy, New Jersey, upon the ground that the city was already inspecting 21 duly licensed distributors, 350 licensed retailers, and 2000 separate sources of milk, and already had more milk than they knew what to do with, and set up the excuse that to inspect the plant of the plaintiff would cause undue burden, and so forth.

LaFranchi v. *City of Santa Rosa,* 8 Cal (2d) 331, 65 P. (2d), 1301, was an action for declaratory relief, and there the Court held unconstitutional an ordinance which prohibited the sale of milk in Santa Rosa which was pasteurized outside the city limits.

Meridian v. *Sippy,* 54 Cal. App. (2d) 214, 128 P. (2d) 884, held invalid an ordinance of the City of Stockton which prohibited the sale of milk that was produced beyond the boundaries of San Joaquin County.

Grant v. *Leavell,* 259 Ky. 267, 82 S.W. (2d) 283, held invalid an ordinance of Louisville which prohibited the sale of milk from plants located outside of Louisville.

Prescott v. *City of Borger,* (Tex. App.) 158 S.W. (2d) 578, involved an ordinance of the City of Borger, which prohibited sale of milk not pasteurized within the county. Plaintiff's plant was 60 miles away, and in another county. The Court held the ordinance in conflict with both the Texas statute and the Constitution.

Opinions of the Attorney General of Michigan, Biennial Report of the Attorney General, 47-48, No. 0-5105, November 6, 1946, holds that a city ordinance providing that no license shall be granted to a *milk producer whose dairy farm is more than thirty miles from the city of Midland, and whose plant is located outside of the city,* is violative of the constitutional rights of property and contract of a dealer whose plant is located outside the city. It is further discriminatory and invalid.

City of Abilene v. *Tennessee Dairies* (Texas 1950) 225 S. W. (2d) 429, holds unconstitutional an inspection fee of Abilene based upon the necessary cost of inspecting plaintiff's plant and the sources of milk on the ground that plaintiff's plant and sources of milk were being adequately inspected by municipalities at the source.

In *Moultrie Milk Shed, Inc.* v. *City of Cairo* (1950 Ga.) 57 S.E. 199, the Supreme Court of Georgia held unconstitutional and unreasonable a city ordinance which prohibited the sale of milk which was not pasteurized in the county. The court stated:

> "Where shall the line marking the limit to which legislation to protect the public health may encroach upon freedom of the individual to engage in competitive and legitimate business be drawn? Our decision here will constitute a precedent, a yardstick by which future similar questions must be decided. If this city is held by this court to be justified in restricting

> the trade in milk as is here done, it would constitute a precedent requiring a holding by this court tomorrow that all other cities could lawfully, upon the theory of protecting the public health, exclude foods such as syrup and pickles produced in Cairo from the markets in other cities unless they were processed in a plant situated within the county in which such cities are located. The most destructive enemy to free enterprise and individual liberty comes dressed in attractive garments, and is covered with a sugar coating in order that the victim will accept it unaware of its future destruction of his own freedom."

The Supreme Court of Wisconsin in its decision relied upon its earlier decision, *Dyer* v. *City of Beloit*, 250 Wis. 613; 27 N.W. 2nd 733. This decision held constitutional an ordinance which prohibited the sale of milk in Beloit, Wisconsin, which was not pasteurized within six miles of the city. The history of this case is as follows:

The appellant appealed that decision to this Court. This Court noted probable jurisdiction October 13, 1947, 68 S. Ct. page 87. Before the case was heard, however, the City of Beloit confessed error, amended its ordinance and gave the appellant, Dyer, a milk license and moved to have the case dismissed as being moot. This motion was opposed by Dyer on the ground that it would leave standing the decision of the Supreme Court of the State of Wisconsin and that under that decision the City of Beloit was left free to re-enact the ordinance in question. This Court in *Dyer* v. *City Council, City of Beloit* on February 2, 1948, 333 U.S. 825; 68 S. Ct. 450, vacated the judgment of the Supreme Court of the State of Wisconsin and remanded it with directions to that Court to proceed as it might deem appropriate. On March 19, 1948, on motion of the appellant to have the judgment of the Circuit Court

for Rock County reversed which originally the Supreme Court of Wisconsin had affirmed in holding the ordinance valid, that court in 252 Wis. 249, reversed the judgment of the Circuit Court for Rock County.

The Supreme Court of Wisconsin now says that regardless of what happened or what the mandates meant that the reasoning and logic of the original case of *Dyer* v. *City of Beloit* still stands.

We submit that when the appellees themselves in the *Dyer* case confessed error in this Court and this Court vacated the judgment that there was no reason or logic left to stand.

II.

The twenty-five mile limitation is a justiciable controversy in this case and the Supreme Court of Wisconsin in refusing to hold the twenty-five mile limitation unconstitutional denied the Appellant due process of law and the equal protection of the law.

The position of the trial court and of the Supreme Court that the appellant cannot have its rights adjudicated as to the twenty-five mile limitation because of the facts (1) that the question is moot so long as the five-mile limitation is valid, and (2) that the 950 various farmers from which the appellant purchases its milk in Northern Illinois and Southern Wisconsin are not party plaintiffs, violates the due process clause of the Fourteenth Amendment and denies to the appellant the equal protection of the law, because it virtually and in fact denies the appellant access to the courts of Wisconsin to have its rights adjudicated therein. The appellant purchases milk from approximately 950 farms. This milk is delivered to the appellant's pasteurization plants, is paid for and becomes the prop-

erty of the appellant. None of these 950 farmers are selling milk or proposing to sell milk in the City of Madison. They sell their milk to the Dean Milk Company, and they have no further voice in the matter as to what becomes of the milk after that.

Sec. 7.11 of the Madison Milk Ordinance prohibits the Dean Milk Company from selling milk in the City of Madison. It provides that:

> "It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin * * * 'for sale or to sell or offer for sale therein or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this Ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin.' "

This section further provides that:

> "The Health Department shall not be obligated to inspect the farms and issue a permit to farms located more than twenty-five miles away."

This paragraph certainly means what it says, that the Dean Milk Company is prohibited from selling milk in the City of Madison, because the source of its milk is produced on farms that do not have permits. The section further provides that the Health Department will not be obligated to inspect and issue permits to farms more than twenty-five miles away. All of the farms from which the Dean Milk Company obtains its milk are more than twenty-five miles away, and as above quoted from the appellees' answer, the appellees will not inspect farms located more than twenty-five miles away, and in fact refuses to even furnish the plaintiff with the applications provided for in this section of the Ordinance (R. 312-313).

Sec. 269.56 of the Wisconsin Statutes is the Uniform Declaratory Judgment Act, and provides as follows:—

(1) "Courts of record * * * shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. * * * and such declaration shall have the force and effect of a final judgment or decree.

(2) "Any person * * * whose rights, status or other legal relations are affected by a * * * municipal ordinance * * * may have determined any question of * * * validity arising under the * * * ordinance * * * and obtain a declaration of rights, status or other legal relations thereunder.

(11) "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the right of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard."

The appellant having applied for a license to sell its milk in the City of Madison, and having been denied the right on the excuse that its milk was not pasteurized within five miles of the City of Madison, and that its milk came from sources more than twenty-five miles away from the City of Madison, was entitled under this statute to have an adjudication of its rights, and a denial thereof is a denial of due process, and of the equal protection of the law, because it in fact denies the appellant access to the courts of Wisconsin.

Assuming that the appellant did persuade 950 farmers in Northern Illinois and Southern Wisconsin to start law suits in the City of Madison attacking the validity of the twenty-five mile limitation, the Wisconsin courts would refuse to pass upon the validity of the twenty-five mile limitation because the trial court plainly stated in his opinion, which is approved by the Supreme Court, that so long as the Dean Milk Company was not going to pasteurize within the five-mile zone, then the twenty-five mile question was moot.

How would the 950 farmers have any standing in the Wisconsin courts anyway, because they do not propose to sell milk in Madison? They sell their milk to the Dean Milk Company. It is the Dean Milk Company that proposes to sell milk in the City of Madison.

The decision compelling the appellant to submit to this section of the Ordinance, by refusing it a remedy, necessarily affirms the validity of this section as to appellant. *Fiske* v. *State of Kansas*, 274 U.S. 380, 47 S. Ct. 655.

This Court said in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 50 S. Ct. 451 at page 453:

> "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because assuming power and merit, the plaintiff did not first seek an administrative remedy which in fact was not available *and which is not now open to it*. Thus by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property."

Applying this reasoning to the case at bar, the State of Wisconsin declines to declare the twenty-five mile limitation unconstitutional, not because of any demerit in the plaintiff's complaint, but because it says that the remedy is not available to the appellant, and that no remedy is now open to the appellant. If the appellant persuaded the 950 farmers to start their litigation, they would be turned out of court on the excuse that the five-mile limitation made the question moot anyway.

The Wisconsin courts have ample power under the declaratory judgment statute to give the appellant the relief that it is entitled to under the Constitution of the United States.

The *Brinkerhoff-Faris Trust & Savings Company* v. *Hill* opinion continues at page 454 as follows:

> "The Federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. • • •
>
> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. • • • whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy unless there is, or was, afforded to him some real opportunity to protect it."

Under the decision of the trial court, which is approved by the Supreme Court of Wisconsin, the appellant is denied all opportunity to have the twenty-five mile limitation declared unconstitutional and no opportunity is given to the appellant to protect its right in this matter.

In *Home Ins. Co. of N. Y.* v. *Morse*, 22 Wallace 445, 22 L. Ed. 365, at page 368:

> "Every citizen is entitled to resort to all of the courts of the country, and to invoke the protection which all laws of all those courts may afford him. A man may not barter away his life or his freedom or his substantial rights."

At Record 13 the trial court stated:

> "There certainly can be no interference with interstate commerce by an ordinance reciting that milk must be *pasteurized* within five miles of Madison. That requirement seizes upon the product after it has come to rest in the state. That is not a prohibition of interstate commerce. It is a purely local regulation."

That is the best argument that has been advanced to date why the twenty-five mile limitation is a justiciable issue in this case and why both limitations are part of the plan to keep outside milk out.

How can the milk that Dean proposes to sell in Madison come to rest within the five mile zone when Section 7.11 of the same ordinance prohibits the sale and storage of milk not produced within twenty-five miles of Madison?

Conclusion.

We submit (1) that both the five-mile limitation and the twenty-five mile limitation are in violation of the Interstate Commerce Clause and the 14th Amendment of the Constitution of the United States; (2) that this record establishes without dispute that appellant's Grade A milk and milk products are pure, wholesome, sanitary, meet all the requirements of the United States Model Milk Ordinance and Code, meet all reasonable requirements for pure and sanitary milk from cow to consumer, and are adequately and thoroughly inspected by responsible state and municipal governments; and (3) that the appellant is entitled to judgment reversing the judgment of the Supreme Court of the State of Wisconsin directing that court to declare the said limitations to be null and void and to direct the Circuit Court for Dane County, Wisconsin, to grant the prayer of the appellant's complaint in that court.

Respectfully submitted,

GEORGE S. GEFFS,
Janesville, Wisconsin,
Attorney for Appellant.

JACOB GEFFS,
ELI BLOCK,
Janesville, Wisconsin,
Of Counsel.